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No. ______

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,

Petitioners,

v.

RICHARD BRUCH,
ALBERT SCHADE,
LEONARD A. SMOLINSKI, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does not ERISA's intent that trust principles govern plan fiduciaries' actions preclude de novo judicial review of a benefits denial using contract principles and require review under the arbitrary and capricious standard of trust law?

2. Must not a former employee have at least a colorable claim to benefits to come within the definition of a "participant" in an employee benefit plan covered by ERISA?

PARTIES TO THE PROCEEDING

The named appellants in the United States Court of Appeals for the Third Circuit were Richard Bruch, John R. Chubb, Albert Schade, Richard Schollenberger, Ronald R. Smith, and Leonard A. Smolinski. These named parties represented three classes comprised of various groups of the non-union salaried employees who were working in the five plants in Pottstown, Pennsylvania; West Caldwell, New Jersey; Perryville, Maryland; Salisbury, Maryland; and Baton Rouge, Louisiana that comprised the Plastics Division of The Firestone Tire & Rubber Company ("Firestone") on November 30, 1980, when the Division was sold to the Hooker Chemical Division of the Occidental Petroleum Corporation. The first class excluded those employees who either retired upon the sale or were paid termination pay with regard to their employment with Firestone. The second class included those employees who did not qualify for normal or early retirement under Firestone's Retirement Plan for Salaried Employees on or before the sale. The third class included those employees who had non-vested accrued benefits credited to their accounts under Firestone's Stock Purchase and Savings Plan, except for those employees with regard to whom Firestone's contributions to the plan had fully vested. Appellants Bruch, Schade, and Smolinski had individual claims as well.

Appellees in the court of appeals were Firestone, The Firestone Tire & Rubber Company Retirement Plan for Salaried Employees, and The Firestone Tire & Rubber Company Stock Purchase and Savings Plan. Firestone has no parent corporation. Firestone's non-wholly owned subsidiaries are Firestone N.Z. Limited (New Zealand); Firestone Portuguesa S.A. (Portugal); and Firestone Hispania S.A. (Spain). Firestone's affiliates are Akron Priority Corporation (Ohio); Corporate Officers & Directors Assurance Ltd. (Bermuda); Delta Holdings, Inc. (Delaware); EXEL Limited (Bermuda); Firestone East Africa (1969) Limited (Kenya); Philtread Tire & Rubber Corporation (Philippines); and Hulera el Centenario S.A. (Mexico).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Cases Page

Cases Page

Cases Page

Cases Page

United States Code

United States Code Page

Legislative Materials

Code of Federal Regulations

TABLE OF AUTHORITIES *(Continued)*

Other Authorities

No. ______

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The Firestone Tire and Rubber Company and certain of its benefit plans (collectively "Firestone") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 31, 1987. That judgment involves two important and recurring questions under the Employee Retirement Income Security Act of 1974 ("ERISA"): (1) what standard of judicial review should apply to a plan fiduciary's denial of benefits and (2) who is a "participant" in a benefit plan and thereby entitled to information about the benefits and operation of the plan. There are irreconcilable differences among the circuits with respect to each of these questions. Review by this Court is urgently needed to guide the lower courts and to reaffirm ERISA's intent to promote the establishment of privately administered employee benefit plans.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (A45-A72)[1] is reported at 640 F. Supp. 519. The opinion of the United States Court of Appeals for the Third Circuit (A1-A44), which reversed the decision of the district court on the questions presented by this Petition, is reported at 828 F.2d 134. The order of the court of appeals denying rehearing and rehearing in banc (A75-A76) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1987. The order denying rehearing and rehearing in banc was entered on September 25, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), and section 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), contain fiduciary responsibility provisions relevant to the standard of review question. The term "participant" is defined in section 3(7) of ERISA, 29 U.S.C. § 1002(7). Section 104(b), *id.* § 1024(b), sets forth a benefit plan administrator's obligations to disclose information about the plan to participants, and section 502(c), *id.* § 1132(c), permits an award of damages for failure to comply with these obligations. These statutory provisions and other relevant portions of ERISA and regulations promulgated thereunder are set forth in the Appendix. (A77-A87)

STATEMENT OF THE CASE

Plaintiffs represent the class of non-union salaried employees who were working in the Plastics Division of Firestone and continued in their jobs after the Division was sold as a going concern in 1980 to the Hooker Chemical Division of Occidental Chemical Corporation. (A4) Plaintiffs brought this action under ERISA to recover termination pay and other benefits allegedly due them as a result of the sale.[2] Certain individual plaintiffs also claimed discretionary damages under section 502(c) of ERISA, 29 U.S.C. § 1132(c), for alleged deficiencies in Firestone's responses to requests they made after the sale for information about Firestone's benefit plans.[3]

On cross motions for summary judgment, the district court ruled in Firestone's favor on all of plaintiffs' then pending claims. (A73) The court held that Firestone's determination that plaintiffs were not entitled to reduction in force ("RIF") termination pay was neither arbitrary nor capricious. (A56) The court noted that nothing in Firestone's policies or in the generally accepted meaning of the term "reduction in force" suggests that employees who remained in their jobs and continued to draw the same wages after the sale of a plant have suffered a RIF. (A53-A54) The court also denied plaintiffs' section 502(c) damage claims, holding (1) that upon the sale the individual requestors ceased to be "participants" in Firestone's benefit plans entitled to information about the plans (A71-A72) and (2) that they had not been prejudiced by Firestone's responses to their requests for information (A72).

On appeal, the court of appeals reversed both of these holdings. The court recognized "the clear weight of authority" supporting use of the arbitrary and capricious standard in

1. References to "A" pages are to the Appendix to this Petition.

2. Plaintiffs also claimed various retirement, stock, and vacation benefits, which are described in the court of appeals' opinion. (A4-A6) All of these claims have been withdrawn, settled, or resolved in favor of Firestone. (A3, A5-A6 n.2)

3. Plaintiff Bruch claimed that he never received a response to his written request for information about Firestone's stock purchase plan. (A71) In their motion for summary judgment, plaintiffs Smolinski and Schade also claimed for the first time that Firestone failed to comply with requests for information concerning its termination pay policies. (A69, A71) (Smolinski had previously complained of inadequacies in Firestone's four letters responding to his request for information about retirement benefits. (A71))

reviewing benefits denials under ERISA (A8), but nonetheless held that Firestone's denial of termination pay should be reviewed de novo (A3). After noting that the deferential arbitrary and capricious standard was derived from the common law of trusts, which is the basis for the fiduciary standards of ERISA (A14), the court concluded that under trust law courts "will not defer to a trustee's judgment when a conflict of interest threatens the trustee's impartiality" (A15). In the court's view, Firestone's status as the sole administrator of its unfunded termination pay plan created such a conflict of interest because "every dollar provided in benefits is a dollar spent by defendant Firestone." (A21) Based on this conflict of interest the court distinguished decisions involving benefit funds governed by section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). The court noted that while section 302(c)(5) establishes fiduciary standards similar to those contained in ERISA (A14), it also assures the impartiality of the plan trustees by requiring that employers and employees be equally represented in the administration of a fund (A15, A21).

Having rejected the trust-based arbitrary and capricious standard of review, the court of appeals held that Firestone's adoption of a termination pay plan was an offer of a "unilateral contract" that its employees accepted by continuing employment with the company. (A30) The court therefore concluded that the district court should not defer to Firestone's decision to deny benefits but should rather determine for itself the validity of that decision "tak[ing] as [its] starting point the principles governing construction of contracts between parties bargaining at arms' length." (A25)[4]

On the damage claims under section 502(c) of ERISA, the court of appeals held that all former employees claiming a right to benefits under a plan are "participants" in the plan within the meaning of section 3(7) of ERISA, 29 U.S.C. § 1002(7). (A41-A42) The court thus concluded that the individual plaintiffs were entitled to information about Firestone's benefit plans in response to their requests regardless of whether they had colorable claims to benefits under the plans. (A43) The court explicitly rejected the contrary positions of two other circuits on this point (A40-A41) and remanded the section 502(c) claims along with the termination pay claim for further proceedings in the district court (A44).

4. The specific principles mentioned by the court were "common usage in the trade," past practice under the plan, and the district court's supplying of a "reasonable" term in the absence of agreement between the parties as to a portion of the contract. (A29-A31)

Firestone's petition for rehearing and rehearing in banc was denied (A75-A76), and Firestone now seeks review in this Court.

REASONS FOR GRANTING THE WRIT

The circuits have taken a range of vastly differing approaches to both of the questions presented by this Petition, and only a ruling by this Court can create the uniformity that Congress intended to establish by enacting ERISA and that is now so obviously lacking. This particular case presents the conflict in its starkest form because identically situated employees of the petitioner company have had their benefit claims reviewed by two different circuits with diametrically opposed results.

The court of appeals' decision not only goes far beyond that of any other circuit that has addressed either issue raised here, it also directly contravenes the public policies Congress adopted in passing ERISA. By subjecting certain ERISA plan fiduciaries' claims determinations to de novo review under contract principles, the court abolished the congressionally mandated discretion of these fiduciaries to decide the validity of benefit claims. Similarly, by defining a "participant" in a benefit plan to include all former employees, the court ignored a key portion of the statutory definition of this term and imposed significant obligations on plan administrators to provide information to individuals who can never be entitled to benefits.

If these radical holdings are permitted to stand, millions of employee benefit plans will be affected. The federal courts

will be flooded with litigation, and some plaintiffs will be able to engage in forum-shopping as they seek the court most likely to grant their claimed benefits or section 502(c) damages. Employers and other administrators and fiduciaries will have to defend these lawsuits and to run the risk of being found in breach of their duties if the courts do not determine that they made the most reasonable decision. An inevitable result of these burdens will be the discontinuance or limitation of some benefit plans — a result that Congress specifically sought to avoid in framing the obligations of ERISA. The decision thus cries out for review and reversal by this Court.

I. THE COURT OF APPEALS' DECISION REQUIRING DE NOVO REVIEW OF A FIDUCIARY'S DENIAL OF BENEFITS CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE LANGUAGE AND INTENT OF ERISA AS ILLUMINATED BY DECISIONS OF THIS COURT.

Every circuit has held that in general the decision of the fiduciary of an employee benefit plan governed by ERISA must be affirmed by a reviewing court unless the decision is "arbitrary and capricious."[5] Although the circuit courts' understanding of how the standard should be applied varies significantly from one case to another,[6] the Third Circuit's decision to abandon the standard in a benefits denial case under ERISA is unprecedented.

The narrowest possible reading of the court of appeals' holding is that the denial of benefits under an unfunded employer-administered termination pay plan is subject to de novo review as if it were a contract between the employer and the former employees. Even on this construction, the holding conflicts with the decisions of seven other circuits — including one that reviewed the very termination pay plan at issue here. *See, e.g., Schwartz v. Newsweek*, 827 F.2d 879, 881 (2d Cir. 1987); *Holland v. Burlington Industries*, 772 F.2d 1140, 1148-49 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 3271 (1986); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987) (reviewing this plan); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983); *Pabst Brewing Co. v. Anger*, 784 F.2d 338 (8th Cir. 1986) (per curiam); *Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1520-21 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985). Each of these cases applied the arbitrary and capricious standard.

Several of these circuits have expressed concern about applying the arbitrary and capricious standard in the context of an unfunded employer-administered termination pay plan. The Ninth Circuit has decided to preserve the standard but to accord "less deference" to the fiduciary's determination. *Jung v. FMC Corp.*, 755 F.2d at 711-12.[7] And just last month the

5. *See, e.g., Jestings v. New England Telephone & Telegraph Co.*, 757 F.2d 8, 9 (1st Cir. 1985); *Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Benefit Plan*, 698 F.2d 593, 599 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52, 56 (3d Cir.), *cert. denied*, 474 U.S. 843 (1985); *LeFebre v. Westinghouse Electric Corp.*, 747 F.2d 197, 204 (4th Cir. 1984); *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97, 99-100 (5th Cir. 1979); *Blakeman v. Mead Containers*, 779 F.2d 1146, 1149-50 (6th Cir. 1985); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 823-24 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Quinn v. Burlington Northern Pension Plan*, 664 F.2d 675, 678 (8th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 654 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); *Peckham v. Board of Trustees of the International Brotherhood of Painters*, 653 F.2d 424, 426 (10th Cir. 1981); *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984); *Maggard v. O'Connell*, 671 F.2d 568, 570-71 (D.C. Cir. 1982).

6. *Compare, e.g., Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985) ("it is not much of an overstatement" to say that a decision is not arbitrary and capricious "whenever a court can review the reasons for the decision without a loud guffaw") *with Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (factors to be considered in applying the arbitrary and capricious standard include "uniformity of construction," "reasonableness" of the fiduciary's reading of the plan, "unanticipated costs," "internal consistency" of the plan, administrative regulations, "factual background" of the decision, and "inferences of lack of good faith").

7. The district court in this case followed this precedent and upheld Firestone's denial of termination pay even under closer scrutiny. (A53)

Eighth Circuit questioned use of the standard but considered itself bound to follow its established precedent. *Agee v. Armour Foods Co.*, No. 87-1096 (8th Cir. Nov. 25, 1987).

The Third Circuit's decision also affects many non-termination pay plans because the court speaks generally of using de novo review whenever a plan administrator has a "conflict of interest." (A15) Such a conflict would naturally arise whenever an employer administers any unfunded plan.[8] Moreover, the court states that a conflict also exists when "the employer's contributions [to a funded plan] in a given year are determined by the cost of satisfying plan liabilities in the prior year."[9] Application of the court's holding in these situations is contrary to many more decisions than can be specifically enumerated here.[10]

The court of appeals' decision has thus fostered precisely the "patchwork scheme of regulation" of employee benefit

8. Employers in this country sponsor approximately 4.5 million welfare benefit plans covering some 65 million participants. Pension & Welfare Administration, U.S. Dep't of Labor, *Employee Retirement Income Security Act 1986 Report to Congress* i. We are aware of no data concerning how many of these plans are funded, but all welfare benefit plans are exempt from ERISA's funding requirements. *See* 29 U.S.C. § 1081(a)(1).

9. Of the 729,000 private pension plans that filed reports with the Internal Revenue Service in 1982, almost 220,000 (covering close to 24 million participants) were "defined benefit" plans in which contributions were actuarially determined on the basis of the benefits expected to become payable. Office of Pension & Welfare Benefit Programs, U.S. Dep't of Labor, *The Handbook of Pension Statistics 1985* 60 & 62 Table 2. Moreover, 18 million of the employees surveyed by the Bureau of the Census in 1983 not covered by a union contract were participants in a pension plan of which the employer was most likely the fiduciary. *Id.* 91 Table 13.

10. Other circuits have also questioned applicability of the arbitrary and capricious standard to certain funded plans. For example, the Ninth Circuit has applied its less deferential version of the standard to an employer fiduciary's decision under a funded plan when that fiduciary was found to have a financial conflict. *See Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152-53 (9th Cir. 1986). Similarly, the Sixth Circuit recently noted in another conflict case that "[w]ere we writing on a clean slate, we might well be persuaded that stricter standard of review should apply." *Varhola v. Doe*, 820 F.2d 809, 813 (6th Cir. 1987).

plans that ERISA was designed to end. *See Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2217 (1987); *see also* H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4650. Not only is the court's holding in direct conflict with that of other circuits, but every aspect of its rationale also has been rejected by this Court or by other circuits. As we will briefly demonstrate, these irreconcilable differences in reasoning have arisen because the court of appeals embarked on its own "policy analysis" instead of following congressional intent.

Application of Contract Rather Than Trust Principles

The most glaring defect in the court of appeals' reasoning is its conclusion that contract principles rather than trust principles should govern review of an ERISA plan fiduciary's decision. (A25-A26) Examining the language and legislative history of the statute, this Court has repeatedly held that courts construing ERISA are to look to trust law, not contract law. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559, 570-74 (1985); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 328-34 (1981); *see also Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 152 (1985) (Brennan, J., concurring).[11]

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), states that the overriding fiduciary duty of a plan trustee is to

11. On a related issue, every circuit that has considered the question has concluded that claimants are not entitled to a jury trial under ERISA because, among other reasons, their rights are governed by trust rather than contract law. *See, e.g., Katsaros v. Cody*, 744 F.2d 270, 278 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Turner v. CF & I Steel Corp.*, 770 F.2d 43, 47 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985); *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. 1980); *Crews v. Central States, Southeast & Southwest Areas Pension Fund*, 788 F.2d 332, 338 (6th Cir. 1986); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 829-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *In re Vorpahl*, 695 F.2d 318, 320 (8th Cir. 1982); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985); *Chilton v. Savannah Foods & Industries*, 814 F.2d 620, 623 (11th Cir. 1987).

"discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." The statute thus tracks the classic statement of a common law trustee's duty "to administer the trust solely in the interest of the beneficiary." Restatement (Second) of Trusts § 170 (1959). This tracking was not inadvertent. "The fiduciary responsibility section ... codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4649.

Given the genesis of ERISA's fiduciary standards in the common law of trusts, Congress plainly intended the courts to apply under ERISA the same standard of review that prevails under trust law. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); *see Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Gilbert v. United States*, 370 U.S. 650, 655 (1962). As section 187 of the Restatement (Second) of Trusts makes clear, a trustee's actions are reviewed under the deferential "abuse of discretion" standard:

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

The court of appeals concluded that this standard is abandoned under the common law "when a conflict of interest threatens the trustee's impartiality." (A15) However, the Restatement (upon which the court purported to rely) makes it clear that the existence of a conflict of interest does *not* alter the standard but is merely to be weighed as a "factor in determining whether there is an abuse of discretion." Restatement (Second) of Trusts § 187 Comment d (1959). A court will interfere with the trustee's discretion only if the plaintiff produces evidence that the trustee in fact was motivated by and acted from an improper purpose. *Id.* § 187 Comment g; *id.* § 170 Comment t; *id.* § 170 Illustration 1; *accord* III A. Scott, *The Law of Trusts* § 187.5 at 1524 (3d ed. 1967).

Common law trust cases not only confirm this analysis but hold a deferential standard of review to be particularly appropriate where the settlor of the trust was aware of a conflict of interest when establishing the trust and nonetheless conferred discretionary power on the trustee. *See, e.g., Childs v. National Bank*, 658 F.2d 487, 490, 494 (7th Cir. 1981); *Goldman v. Rubin*, 292 Md. 693, 441 A.2d 713, 724 (1982); *Svenson v. First National Bank*, 5 Mass. App. 440, 363 N.E.2d 1129, 1136-37 (1977); *Turnure v. Turnure*, 89 N.J. Eq. 197, 104 A. 293, 295 (1918); *In re Kellogg's Trust*, 35 Misc. 2d 541, 230 N.Y.S.2d 836, 840 (Sup. Ct. 1962); *In re Flagg's Estate*, 365 Pa. 82, 73 A.2d 411, 415 (1950). The basic rationale for deference in this situation is to ensure that decision-making authority rests with the person to whom it has been committed. *See generally* Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982).

This rationale for deferring to the discretionary decision of a fiduciary who was known in advance to have a potential conflict of interest is directly applicable here. Despite its knowledge of the potential for a conflict of interest, Congress unquestionably intended employer fiduciaries to exercise discretion with respect to ERISA plans. Service as a fiduciary by definition requires the exercise of discretion. *See* 29 U.S.C. § 1002(21)(A)(iii). Moreover, ERISA expressly provides that its comprehensive prohibitions on conflict of interest transactions (*see* 29 U.S.C. §§ 1106-1107) do not prevent an employer or his representative from serving as a fiduciary (*id.* § 1108(c)(3)). *See Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410-12 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). In fact, Congress *required* employers to act as fiduciaries by serving as plan administrators in certain circumstances. *See* 29 U.S.C. § 1002(16)(A)(ii).

By abandoning trust principles in favor of de novo review in this case, the court of appeals abolished the discretion that Congress intended employer fiduciaries to exercise. Congress determined to establish only minimum standards and safeguards for private benefit plans in order to be "consistent with retention of the freedom of decision-making vital to pension

plans" and "in furtherance of the growth and development of the private pension system." S. Rep. No. 127, 93d Cong., 1st Sess. 13 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4849-50. This decision-making includes the day-to-day processing and payment of benefits (*see Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2219) as well as the occasional setting of benefit levels (*see Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981)).

Thus, even when the fiduciary is alleged to have a conflict of interest, ERISA intended that authority to decide "claim eligibility disputes ... remain with those who formulate and administer company plans and policies." *Holland v. Burlington Industries*, 772 F.2d at 1148; *see also Jung v. FMC Corp.*, 755 F.2d at 713; *Sly v. P.R. Mallory & Co.*, 712 F.2d at 1211. Only by deferring to fiduciaries' benefits determinations can courts conform to this legislative intent.

Creation of Varying Standards of Review Under ERISA

The court of appeals' decision to require stricter judicial scrutiny of the benefits denial of a plan fiduciary when he is alleged to have a conflict of interest is also contrary to congressional intent and to established case law. Other courts have concluded that "to vary the standard of judicial review for general asset welfare plans would only sow confusion in ERISA" without any statutory basis. *Holland v. Burlington Industries*, 772 F.2d at 1148-49; *accord In re Vorpahl*, 695 F.2d at 320.

ERISA provides no support for subjecting the decisions of certain plan fiduciaries to greater judicial scrutiny based upon the identity of the fiduciary or whether the plan is funded. With certain limited exceptions not applicable here (*see* 29 U.S.C. § 1101(a)), Congress applied the same set of fiduciary standards to all benefit plans.

When Congress created a unitary set of fiduciary duties applicable to all plan fiduciaries, one of the major studies it relied upon revealed that 61% of the plans surveyed were

employer-administered. *See* Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Statistical Analysis of Major Characteristics of Private Pension Plans* 31 (Comm. Print 1972). Congress also made an explicit decision to broaden the coverage of ERISA's fiduciary duties to include unfunded plans. *Compare* S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973), *reprinted* in 1974 U.S. Code Cong. & Admin. News 4838, 4866 (Senate bill applied fiduciary duties only to "funds," *i.e.*, "only to those funds which leave assets at risk") *with* H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4650 (House bill applied fiduciary duties to "plans," not only to "funds") *and* 29 U.S.C. § 1104(a)(1) (statute applies fiduciary duties to "plans").

Congress' adoption of a single set of fiduciary standards in ERISA is especially significant because in section 4(a), 29 U.S.C. § 1023(a), it provided that the statute would govern all plans whether established and maintained by an employer, a union, or both. On occasion Congress did vary statutory obligations. For example, ERISA spells out major differences between funded and unfunded plans and requires that certain types of plans be funded. *See id.* §§ 1081-1086. The fact that Congress invoked distinctions in some sections of ERISA but not in the fiduciary responsibility section demonstrates the clear congressional intent that they be given no significance in the latter context. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 102-03 (1820) (Marshall, C.J.).

Having imposed uniform standards on all ERISA fiduciaries, Congress plainly intended that courts defer to those upon whom they imposed these standards. Benefits determinations are within the heart of the discretion committed to ERISA fiduciaries, because these determinations require balancing the valid interests of present claimants against the valid interests of future claimants (who benefit from the denial of meritless claims). *See Elser v. I.A.M. National Pension Fund*, 684 F.2d at 656; *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984).

The incongruous result of the court of appeals' decision is to remove this discretion from certain fiduciaries and to make district courts in effect the fiduciaries of the benefit plans involved.

In support of this result, the court of appeals reasoned that courts should not defer to a fiduciary who is alleged "to have acted in his own interest and contrary to the interest of the beneficiaries." (A24) We have already noted, however, that Congress determined to permit an employer to serve as a fiduciary despite this potential conflict of interest. (*See supra* at 11) Moreover, this Court has explicitly held that beneficiaries of an unfunded benefit plan and the employer who administers that plan have a "common interest" in ensuring "the financial integrity of the plan." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 142 n.9. This common interest in defeating meritless claims of present claimants is one reason why application of the arbitrary and capricious standard continues to be appropriate even in this context. *See Holland v. Burlington Industries*, 772 F.2d at 1148-49; *Jung v. FMC Corp.*, 755 F.2d at 711-12.

Rejection of LMRA Precedent

Finally, the court of appeals erred in refusing to follow cases decided under section 302(c)(5) of the LMRA applying the arbitrary and capricious standard of review to the determinations of trustees of benefit funds. (A21) This Court has held that Congress intended to import into ERISA the substantial body of law that had been developed under the LMRA. *NLRB v. Amax Coal Co.*, 453 U.S. at 332; *see also Nedd v. UMW*, 556 F.2d 190, 206 n.31 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

Even before the adoption of ERISA in 1974, the law was well settled that the arbitrary and capricious standard applied under section 302(c)(5) of the LMRA to determine whether plan trustees had violated their fiduciary duties. *See, e.g., Lee v. Nesbitt*, 453 F.2d 1309, 1311 (9th Cir. 1972); *Gomez v. Lewis*, 414 F.2d 1312, 1314 (3d Cir. 1969); *Kosty v. Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964

(1964).[12] Given the congressional intent to incorporate into ERISA the established law under the LMRA, it is not surprising that early ERISA cases reasoned that the arbitrary and capricious standard was also applicable under ERISA. *See, e.g., Bueneman v. Central States, Southeast & Southwest Areas Pension Fund*, 572 F.2d 1208, 1209 & n.3 (8th Cir. 1978); *Reiherzer v. Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978); *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d at 99-100 & n.3.

The court of appeals attempted to distinguish LMRA cases by suggesting that plans governed by the LMRA are protected by "elaborate requirements" in that statute (A15) that do not exist for plans governed only by ERISA (A21). This is precisely backwards. It was the absence of adequate safeguards under then existing law that prompted Congress to enact the detailed and stringent fiduciary standards of ERISA and to apply those safeguards to all benefit plans, including those covered by the LMRA. *See, e.g.*, S. Rep. No. 127, 93d Cong., 1st Sess. 4-5, 15 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4841, 4851; Staff of General Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess., *Interim Staff Report of Activities of the Pension Study Task Force* 58 (Comm. Print 1972).

Simply put, the LMRA relies upon a *procedural* device (equal representation) to guard against conflict of interest transactions, while ERISA relies upon express *substantive* prohibitions (*see* 29 U.S.C. §§ 1104-1107) to achieve the same end. The substantive constraints are surely no less effective than the procedural.[13] Indeed, where both § 302(c)(5) and

12. *Accord Wilburn v. Steamship Trade Association*, 376 F. Supp. 1228, 1239-40 (D. Md. 1974); *Patterson v. UMW Welfare & Retirement Fund of 1950*, 346 F. Supp. 11, 13 (E.D. Tenn. 1971); *Barlowe v. Roche*, 161 A.2d 58, 63 (D.C. 1960); *Judge v. Kortenhaus*, 79 N.J. Super. 574, 192 A.2d 320, 327-28 (Ch. Div. 1963); *Bono v. Kramer*, 346 Mass. 355, 191 N.E.2d 760, 764 (1963); *Occidental Life Insurance Co. v. Blume*, 65 Wash. 2d 643, 399 P.2d 76, 79 (1965).

13. Ironically, the legislative history of the LMRA demonstrates that the equal representation requirement was intended to guard against con-

ERISA governed a benefit plan, this Court relied on the latter statute to reject a claim that employer-appointed trustees were collective bargaining "representatives" of the employer within the meaning of the LMRA. It was "the fiduciary requirements of ERISA" that the Court concluded "specifically insulate[d] the trust from the employer's interest." *NLRB v. Amax Coal Co.*, 453 U.S. at 333.

Furthermore, precedent under the LMRA was not the only established law of which Congress was aware when it enacted ERISA. By 1974 it had long been settled that the determinations of trustees of employee benefit plans not governed by the LMRA, and thus not subject to an equal representation requirement, were reviewed under the arbitrary and capricious standard. *See, e.g., Reese v. Administrative Committee of the Profit Sharing Trust*, 218 Cal. App. 2d 646, 32 Cal. Rptr. 818, 820 (1963); *Kloman v. Doctors Hospital*, 76 A.2d 782, 785 (D.C. 1950); *Van Pelt v. Berefco, Inc.*, 60 Ill. App. 2d 415, 208 N.E.2d 858, 863 (1965).[14] This line of authority, completely ignored by the court of appeals, decisively undermines the distinction that the court drew between those plans that are and those that are not subject to the LMRA's equal representation provision.

When Congress enacted ERISA in 1974, it acted with full knowledge of the existing common law of trusts, the law developed under the LMRA, and the common law of employee benefits. Each of those sources of law provided that the arbitrary and capricious standard governed review of trustees'

flict of interest transactions by unions, not employers. *See NLRB v. Amax Coal Co.*, 453 U.S. at 330 n.13; *Arroyo v. United States*, 359 U.S. 419, 426 (1959).

14. *Accord Western Union Telegraph Co. v. Robertson*, 146 Ark. 406, 225 S.W. 649, 652 (1920); *Smith v. New England Telephone & Telegraph Co.*, 109 N.H. 172, 246 A.2d 697, 698 (1968); *Gitelson v. DuPont*, 17 N.Y.2d 46, 215 N.E.2d 336, 337 (1966); *Oiler v. Dayton Reliable Tool & Manufacturing Co.*, 42 Ohio App. 2d 26, 326 N.E.2d 691, 694-95 (1974); *Going v. Southern Mill Employees' Trust*, 281 P.2d 762, 763-64 (Okla. 1955); *Garner v. Girard Trust Bank*, 442 Pa. 166, 275 A.2d 359, 361 (1971); *Neuhoff Brothers Packing Management Corp. v. Wilson*, 453 S.W.2d 472, 474 (Tex. 1970).

actions. This Court should grant review to confirm for the benefit of the increasingly uncertain lower courts that Congress meant this standard to be applied to the benefits determinations of ERISA plan fiduciaries as well.

II. THE COURT OF APPEALS' INCLUSION OF ALL FORMER EMPLOYEES AS "PARTICIPANTS" IN AN ERISA BENEFIT PLAN CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, FAILS TO GIVE MEANING TO STATUTORY LANGUAGE, AND IMPOSES IMPOSSIBLE BURDENS ON PLAN ADMINISTRATORS CONTRARY TO CONGRESSIONAL INTENT.

Many provisions of ERISA—including the right to claim damages under section 502(c), 29 U.S.C. § 1132(c), for an administrator's alleged inadequacies in responding to a request for information about a benefit plan—are applicable only to "participants" or "beneficiaries" of a benefit plan.[15] Section 3(7) of the statute, *id.* § 1002(7), defines the term "participant" to include

> any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . .

The court of appeals held that any former employee claiming benefits under a plan qualifies as a participant in the plan under this definition. (A42) This far-reaching holding

15. A participant must be sent plan documents at specified times and intervals (29 U.S.C. § 1024(b)(1)); may examine such documents at any time at specified places (*id.* § 1024(b)(2)); must be sent financial information annually (*id.* § 1024(b)(3)); must be sent copies of plan documents on request (*id.* § 1024(b)(4)); and must be sent information as to his accrued and nonforfeitable benefits on request once a year (*id.* § 1025(a)). Additionally, a participant may bring suit in federal court to enforce his rights under ERISA under section 502(a) of the statute, *id.* § 1132(a), and may be entitled to attorneys' fees under section 502(g), *id.* § 1132(g), as well as to discretionary damages under section 502(c).

conflicts with the decisions of every other circuit that has considered the issue, with any common sense reading of the phrase "may become eligible to receive a benefit," and with congressional intent.

The court of appeals included within the term "participant" "both people who are in fact entitled to a benefit under the plan and ... those who claim to be but in fact are not." (A42) The court applied its decision to "[p]eople who worked for a company for a time, and who are not certain whether or not they are entitled to benefits" (*id.*) and to claimants whose "claim for benefits is not colorable" (A43). Thus, under the decision it is impossible to justify a plan administrator's restricting any former employee's access to benefits information—including information that must be regularly provided in perpetuity without being specifically requested.

As the court of appeals acknowledged, other circuits have adopted a different view of who qualifies as a participant. (A40-A41) Indeed, though the court did not distinguish them, the other circuits' rules vary among themselves. The Fifth Circuit has held that the "may become eligible" language was intended to apply only to current employees (*Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 228 (5th Cir. 1981)) and that former employees are participants only if their benefits have vested (*Nugent v. Jesuit High School*, 625 F.2d 1285, 1287 (5th Cir. 1980)).[16] The Ninth Circuit has rejected this restrictive approach and has held that a former employee is a participant if he has either "a reasonable expectation of returning to covered employment" or a "colorable claim to vested benefits." *See Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 318 (1987); *Weiss v. Sheet Metal Workers Local 544 Pension Trust*, 719 F.2d 302, 303

16. Based on Fifth Circuit precedent, the Fourth Circuit has refused to adopt a broad reading of the term "participant." *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986). As the court of appeals noted (A41), the Fourth Circuit also has held that an individual who was designated as a beneficiary by a plan and had claimed benefits thereunder had standing to bring suit under section 502(a) of ERISA as a "beneficiary." *Salomon v. Transamerica Accidental Life Insurance Co.*, 801 F.2d 659 (4th Cir. 1986).

(9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984). The Second Circuit, whose precedent on this issue is not mentioned by the court of appeals, follows the same approach as the Ninth. *See Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473 (2d Cir. 1985).[17]

The court of appeals' holding not only squarely conflicts with these other circuits' precedents but also contravenes the language and intent of ERISA. This Court recently noted "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). The court of appeals' interpretation of ERISA's definition of the term "participant" fails to give any meaning to the phrase "may become eligible." *See Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 476. Congress must have intended this phrase to exclude at least those former employees who will clearly not become eligible to receive benefits. The court of appeals, however, included within the definition all former employees—including those with no colorable claim that they will ever become entitled to benefits. (A43)

The court of appeals' expansive reading of the term "participant" also fails to take into account the concern expressed in the legislative history of ERISA that plans not be so heavily burdened by regulation that "employers respond ... by decreasing benefits under existing plans or slowing the rate of formation of new plans." H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4682. Given ERISA's broad venue provision, the court's holding affects every benefit plan offered by a company that is incorporated, licensed to do business, or doing business or that can be found in the Third Circuit—even if the plan does not cover individuals or facilities within the Circuit. *See* 29 U.S.C. § 1132(e)(2); 28 U.S.C. § 1391(c). In order to

17. The cases cited above speak of a claim to vested benefits because they involved pension plans, which (unlike welfare plans) are subject to ERISA's vesting requirements. *See* 29 U.S.C. § 1051(1).

comply with ERISA's information disclosure provisions (*see* 29 U.S.C. § 1024(b)), the administrator of each such plan will have to send various plan documents to every former employee of the company and to respond within 30 days to written requests for plan information from any such former employee. The cost of complying with these time-consuming disclosure obligations may well "reduce the amounts available to actual beneficiaries of the plan for no statutory purpose." *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 476.

The court of appeals believed that its holding served the statutory purpose of arming "individual participants and beneficiaries ... with enough information to enforce their own rights." S. Rep. No. 127, 93d Cong., 1st Sess. 27 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4863 (quoted at A43). This argument is mere bootstrapping because the quoted passage from the legislative history itself speaks of "participants" who have "rights" and not of "claimants." Moreover, as the Second Circuit has noted, this statutory purpose is adequately served by interpreting the term "participant" to include former employees with colorable claims to eligibility. *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 477.

The court of appeals' ruling was largely motivated by a belief that any individual "who claims to be" a participant or beneficiary should have standing to bring suit under section 502(a) of ERISA, 29 U.S.C. § 1132(a). (*See* A41) The Second Circuit rejected this concern out of hand, noting that "the courts are obviously free to reexamine a litigant's status under the plan." *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 477 n.5. Whether this examination goes to standing, to jurisdiction, or to the merits is beside the point.[18] The inquiry is necessary in any event. *See Freeman v. Jacques*

18. The court of appeals cited *Bell v. Hood*, 327 U.S. 678, 682 (1946), as holding that "a lack of standing should not be confused with a lack of subject matter jurisdiction." (A42) In fact, in *Bell* this Court reversed a lower court's dismissal for lack of jurisdiction, explaining that failure to state a claim goes rather to the merits.

Orthopedic & Joint Implant Surgery Medical Group, 721 F.2d 654, 656 (9th Cir. 1983).

Finally, it bears noting that the court of appeals' decision is contrary to regulations of the Department of Labor, the agency delegated by Congress to enforce ERISA and in particular to monitor compliance with the disclosure provisions. *See* 29 U.S.C. §§ 1021-1031. According to the regulations, an individual ceases being a participant when he or she becomes "ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur." 29 C.F.R. § 2510.3-3(d)(2)(i)(A). In this case, plaintiffs became ineligible to receive benefits when they could no longer be RIFed or continue to accumulate vested stock rights. This occurred when the division in which they worked was sold to another company and long before they requested information about Firestone's benefit plans.

Regulations such as these are entitled to deference by the courts. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Indeed, the other circuits that have considered ERISA's definition of the term "participant" have relied on these administrative interpretations in giving that definition a much narrower reading than did the court of appeals. *See, e.g., Kuntz v. Reese*, 785 F.2d at 1412; *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 476-77; *Nugent v. Jesuit High School*, 625 F.2d at 1288 n.9. The existence of these regulations further heightens the need for this Court to grant review and to resolve the conflict over who is a participant entitled to information and other relief under ERISA.

CONCLUSION

This case presents two important and pervasive issues under ERISA as to which the circuits are in clear conflict. The failure of the court of appeals to adhere to congressional intent in its resolution of these issues and the consequent confusion that is certain to ensue among employers and plan administrators make review by this Court imperative. The Court should grant the Petition and reverse the judgment of the court below in order to restore order, uniformity, and reason to the law governing employee benefit plans.

Respectfully submitted,

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December 23, 1987